Constitutional paths not taken: Germany vs. Italy before the ICJ

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by CHRISTIAN DJEFFAL

On 3 February 2012 the International Court of Justice (ICJ) gave the eagerly awaited judgment in the case *Jurisdictional Immunities of the State*. It held that Italy violated its international obligations towards Germany in three instances. Firstly, civil claims based on violations of humanitarian law during the Second World War were allowed before Italian courts. Secondly, measures of constraint were taken against German state property, namely the 'Villa Vigoni'. Thirdly, judgments based on violations of humanitarian law in Greece during the Second World War were declared enforceable in Italy. The issue before the court concerned several hundred thousand Italian soldiers that were detained by the German army after Italy declared war on Germany, deported to Germany and German occupied territories and forced to work without remuneration. These internees did not qualify for German schemes that aimed to compensate victims for different reasons. Although the Italian state received compensation for outstanding claims of natural and legal persons it did not compensate the former internees.

At the heart of the case lied the question whether Germany could invoke state immunity or whether there existed an exception to the immunity so that Italian courts could establish their jurisdiction. Using Joe Weiler's metaphor of the geology of international law, one could say that the law of state immunity is rooted deep in the lower layers of public international law where maxims like *par in parem non habet imperium* of Bartolus de Sassoferato played an important role in justifying that one state has no jurisdiction over the other.

Have new strata changed the nature of the law on state immunity? To answer this question, the court had to apply customary international law as all attempts of codification on the regional or international level failed to attain universal consent of the states.

The ICJ employed a positivistic and source oriented approach. Whereas the court has in several instances been

criticised for not providing enough evidence of state practice or opinio juris or being unclear how the two categories interrelate, the case at hand will find its way into all relevant textbooks and articles on the matter as the court approached the questions systematically and thoroughly.

The big question was whether there were any exceptions to state immunity that could be invoked by Italy. Of the several reasons brought forward by Italy the 'ius cogens exception' was most controversially debated in the last twenty years. This discussion was triggered by an innovative essay of three American law students arguing that states should not be allowed to claim immunity if they violated ius cogens norms. This fresh take on the matter found some support in American and European academia. Before the judgments of Italian courts, there were no precedents holding that the violation of ius cogens norms trumps state immunity although in the *Al-Adsani* case before the ECHR it was only a very slim majority of 9 to 8 judges that rejected the theory.

The opinion of the ICJ is, however, deeply rooted in the traditional layers of public international law. It regards the law of state immunity as a procedural matter as opposed to the substantive question of lawfulness. Pointing to its jurisprudence as well as to the jurisprudence of national courts it substantiated this distinction. These are, of course, sound arguments. Another decision might have opened the floodgates of domestic proceedings all over the world and disrupted the smooth course of diplomatic relations. Unique places for cross-cultural encounter like the Villa Vigoni might have been endangered.

But the court knew the price for upholding state immunity: although there was an undisputed and flagrant violation of fundamental norms of international law, the victims were left without compensation. The ICJ mentioned that the states still had the possibility to put things right through negotiations. But these parts of the judgment show the uneasiness of the court facing this kafkaesque situation in which people stand before the law that is made for them but are kept outside by the doorkeeper named state immunity.

One might argue that the norms of ius cogens are higher law and could be termed as constitutional norms. While one might detect a process of 'constitutionalisation' in international law, the case at hand clearly shows that there might be constitutional norms but yet no constitutional courts.

Legal history has seen many acts of judicial self-empowerment in which courts have asserted their capacity to effectuate the normative hierarchy. These judicial revolutions like in *Marbury vs. Madison* or *Costa/E.N.E.L.* were based on the premise that hierarchy had to become effective in legal reality and justified by teleological arguments.

The ICJ might have asked whether the ratio of state immunity, the protection of sovereign equality, also applies to the protection of community interests. Whether one more exception to state immunity would really have uprooted the system of public international law. Whether fundamental norms can really be isolated from procedural norms in such a rigid way. Recent scholarship has tried to reconceptualise the role national courts play in international law. The ICJ could have changed its perception of national courts as being solely organs of the state and moved more towards perceiving them also as agents of international law.

But it did decided to play it safe and confine its arguments to state practice and precedents. As previously mentioned, it can be said that the ICJ had good reasons for the decision. If there ever was a development towards another exception to state immunity, this judgment will have frozen it for the years to come. While Judges Yusuf and Cançado Trindade dissented on the question, even the Italian Judge ad hoc Gaja and Judge Simma, being a leading human rights lawyer at the court, were in line with the court's solution with regard to ius cogens. So there seems to be little indication that international lawyers will take another path. So it seems that the doorkeeper will stay before the law.

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